PEMBINAAN KSY SDN. BHD.

v.

LIAN SENG PROPERTIES SDN. BHD.

SUPREME COURT, KUALA LUMPUR
HASHIM YEOP SANI CJ (MALAYA)
MOHD. YUSOFF MOHAMED SCJ
WAN YAHYA J
[SUPREME COURT CIVIL APPEAL NO. 02-251-1989]
29 OCTOBER 1990

COMPANY LAW: *Petition for winding-up - Whether supporting creditor has locus standi.*

The respondent company is indebted to the appellant for RM10.5 million. On 31 March 1987 the appellant obtained judgment in default for the said sum against the respondent. On 2 April 1987 the parties entered into an agreement that upon completion of the respondent's development project, the respondent would pay the appellant a lump sum of RM26,050,000.

On 10 December 1987 a winding-up petition was filed against the respondent by Morgan Guaranty Trust Co. (MG) and the appellant gave notice of intention to support the petition. On 6 March 1989, the respondent company filed a notice of motion to strike out the appellant as a supporting creditor on the grounds that it had no *locus standi*. The High Court granted the order on the ground that the default judgment relied on by the appellant was a nullity. Hence this appeal.

Held:

[1] The question is whether the default judgment is a sufficient basis for the appellant's application to support the petition.

[2] The petition should not have been set aside. The conclusion of the learned Judge was misconceived. The default judgment obtained by the petitioner against the respondent was a good and enforceable judgment until it has been set aside. That application to set aside the default judgment was made on 4 April 1987 and served on the petitioner only on 19 May 1990. That being so, the petitioner was perfectly entitled to rely on the default judgment as the basis for its rights to be a supporting creditor and should be recognised in the petition as a supporting creditor.

[Appeal allowed.]

Cases referred to:

Anlaby & Ors. v. Praetorius [1888] 20 QBD 164
Syarikat Joo Seng & Anor. v. Habib Bank Ltd. [1986] 2 MLJ 129
Eu Finance Bhd. v. Lim Yoke Foo [1982] 2 MLJ 37
Harkness v. Bell's Asbestos and Engineering Ltd. [1967] 2 QB 729
Isaacs v. Robertson [1984] 3 All ER 140
Hadkinson v. Hadkinson [1952] 2 All ER 567

For the appellant - P.S. Gill; M/s. Gill & Tang
For the respondent - M.S. Murthi; M/s. Murthi & Partners

JUDGMENT

Hashim Yeop Sani CJ (Malaya):

The appellant company, Pembinaan KSY Sdn. Bhd. (KSY) were the contractors to Lian Seng Properties Sdn. Bhd. (the company) engaged for the development project of a property (now called K.L. Plaza) owned by the company.

The company had borrowed heavily from various financial institutions for the development project and by June 1986 the company owed KSY RM10,529,000 on account of unpaid architect's certificates. In fact work on the development project came to a standstill on account of the company's failure to pay and the banks refused to lend any more money to the company. After some negotiations which must have aborted KSY finally sued the company for the amount of RM10,529,000 in January 1987.

After various extensions of time granted by the Court for the company to file the defence KSY finally entered judgment in default on 31 March 1987 for the same sum and the company was duly informed of this fact.

On 22 April 1987 KSY and the company signed a lump sum agreement after negotiations with the various financial institutions where the company agreed that upon completion of the development project they would pay KSY a lump sum of RM26,050,000. KSY completed the balance of the work on the development project and a certificate of practical completion was issued on 1 December 1987 but no payment was made.

On 10 December 1987 a winding-up petition was filed by Morgan Guarantee Trust Company of New York against the company which was the subject of another appeal (Supreme Court Civil Appeal No. 02-454-89). KSY gave notice of intention to support the Morgan Guarantee Trust petition on 15 April 1988. In the appeal by Morgan Guarantee Trust we held that Morgan Guarantee Trust Company of New York was competent to file the petition on the date of the petition.

The winding-up petition was postponed a number of times and on 6 March 1989 the company filed a notice of motion to strike out KSY as a supporting creditor on the grounds that it had no *locus standi* to support the petition. The learned Judge granted the order in terms of the motion. Hence this appeal.

In his written judgment the learned Judge found that KSY founded its rights to be a supporting creditor on two judgments namely the default judgment entered on 31 March 1987 for RM10,529,000 and an O. 14 judgment obtained on 17 November 1988 for RM12,902,000. As the O. 14 judgment was granted subsequent to the date the company gave notice of intention to support the petition, that is 15 April 1988, we need only concern ourselves in this appeal with the default judgment.

The question is whether the default judgment is a sufficient basis for KSY's application to support the petition.

The learned Judge devoted a substantial part of his written judgment on the reasons why he found the default judgment to be "null and void" and should therefore be set aside. He concluded at p. 15 of his judgment:

> Accordingly the said default judgment entered on 31 March 1987 was irregularly entered independent of the R.H.C. and should be set aside *ex debito justitiae*.

The reasons why he came to this conclusion was that he held that the company had seven days from 23 March 1987 to file the defence, that is, it had up to 2 April to file the defence. Since O. 3 r. 2(5) of the Rules of the High Court 1980 excludes Saturday and Sunday and purporting to apply *Anlaby & Ors. v. Praetorius* [1888] 20 QBD 164 and *Syarikat Joo Seng & Anor. v. Habib Bank Ltd.* [1986] 2 MLJ 129 the learned Judge ruled that the default judgment relied on by KSY was a nullity. Since the default judgment was a nullity the company had the option to ignore it or go to Court to set aside relying on *Eu Finance Bhd. v. Lim Yoke Foo* [1982] 2 MLJ 37.

With respect, the conclusion of the learned Judge was in our view misconceived.

Syarikat Joo Seng & Anor. was an appeal where judgment in default of defence was entered without obtaining leave from the Court or Judge. There the appellant had applied to set aside the default judgment and that was refused by the High Court Judge and the appeal was against the refusal. In that case the respondent should have complied with O. 19 r. 7(1) of the Rules of the High Court by applying to the Court or Judge for leave to enter judgment against the appellant.

Eu Finance Bhd. concerned an appeal on the administrative act of the Collector of Land Revenue and the issue before the Court concerned jurisdiction. In *Harkness v. Bell's Asbestos Engineering Ltd.* [1967] 2 Q.B. 729 Lord Diplock was referring to an order which is a nullity not an order which has been irregularly obtained.

The default judgment in this case until set aside is a good and enforceable judgment. The correct law on this issue is as stated in *Isaacs v. Robertson* [1984] 3 All ER 140 where the headnote reads:

> Orders made by a Court of unlimited jurisdiction in the course of contentious litigation are either regular or irregular. It is misleading to seek to draw distinctions between orders that are 'void', in the sense that they can be ignored with impunity by those persons to whom they are addressed, and orders which are 'voidable', in the sense that they may be enforced until set aside, since any order must be obeyed unless and until it is set aside and there are no orders which are void *ipso facto* without the need for proceedings to set them aside.

In the speech of Lord Diplock reference was made to the passage in the judgment of Romer LJ in *Hadkinson v. Hadkinson* [1952] 2 All ER 567.

> It is the plain and unqualified obligation of every person against, or in respect of, whom an order is made by a Court of competent, jurisdiction to obey it unless and until that order is discharged.

In this case the application to set aside the default judgment although made on 4 April 1987 was only served on KSY on 19 May 1990. It was exhibited for the first time in the company's application in the proceeding.

It was clear to us that KSY was perfectly entitled to rely on the default judgment as basis for its rights to be a supporting creditor and KSY should be recognised in the petition as a supporting creditor.

The appeal was accordingly allowed with costs here and below.

Also found at [1991] 1 CLJ 263